

DECISION



THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D. C. 20548

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FILE: B-178551

DATE: March 7, 1979

MATTER OF: *Against the United States*
✓ Payment of judgments under Back Pay Act and Title
VII of Civil Rights Act.

- DIGEST:
1. Judgments against the United States awarding back pay under the Back Pay Act but not indicating the dollar amount to be paid are nevertheless money judgments against the United States and therefore payable from the permanent appropriation established by 31 U.S.C. § 724a. However, since an agency's computation of back pay is subject to judicial review, a judgment without a dollar amount cannot be considered "final" for purposes of certification for payment until GAO has been furnished the agency's computation together with written indication, administrative or judicial, that the plaintiff will accept the amount in satisfaction of the judgment.
 2. *He* Even though the agency or unit head is the nominal defendant in an employment discrimination suit under Title VII of the Civil Rights Act of 1964, as amended, *a suit* under 42 U.S.C. § 2000e-16 is nevertheless a suit against the United States. Judgments against the Federal Government in Title VII actions are therefore payable from the permanent appropriation established by 31 U.S.C. § 724a.

This decision is the result of two questions which have arisen in recent months. The questions involve the source of funds for the payment of judgments and awards against the United States in various contexts, and hence are treated together.

For the most part, judgments against the United States are paid from the permanent indefinite appropriation contained in 31 U.S.C. § 724a (1976), as amended by Pub. L. No. 95-26 (May 4, 1977), 91 Stat. 61, 96, set forth in pertinent part below:

"There are appropriated, out of any money in the Treasury not otherwise appropriated, such sums as may be necessary for the payment, not otherwise provided for, as certified by the Comptroller General, of final judgments, awards, and compromise settlements, which are payable in accordance with the terms of section 2414, 2517, 2672, or 2677 of Title 28 * * *."

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The questions to be considered are whether judgments and awards in the following situations are payable from the indefinite appropriation or from agency appropriations ("otherwise provided for").

(1) Judgments under the Back Pay Act which direct the payment of back pay but which do not specify the dollar amount to be paid.

(2) Judgments under Title VII of the Civil Rights Act of 1964, as amended.

1. Judgments involving the Back Pay Act.

The Back Pay Act entitles employees of agencies specified in the Act to back pay where the employee "is found by appropriate authority under applicable law, rule, regulation, or collective bargaining agreement, to have been affected by an unjustified or unwarranted personnel action." 5 U.S.C. § 5596 (1976), as amended by section 702 of the Civil Service Reform Act of 1978, Pub. L. No. 95-454 (October 13, 1978), 92 Stat. 1111, 1216. Implementing regulations are found at 5 C.F.R. §§ 550.801 et seq. The regulations recognize a court of competent jurisdiction as an "appropriate authority" under the Act. 5 C.F.R. § 550.803(c). Actions are brought in the Court of Claims or in the district courts. One of the more common situations is a claim of wrongful termination or dismissal and the remedy sought is reinstatement plus back pay.

It is clear that a covered judgment which awards back pay and specifies the amount to be paid is payable, upon becoming final, from the permanent judgment appropriation. See 31 U.S.C. § 724a, supra; 28 U.S.C. § 2414; 28 U.S.C. § 2517. It is equally clear, where a judgment orders reinstatement or other corrective action but does not mention back pay, that entitlement to back pay arises from the Back Pay Act rather than from the judgment itself, and in such a case the back pay is payable by the employing agency from its own appropriations.

The more difficult situation is a judgment which directs the payment of "back pay in accordance with the Back Pay Act," or similar language, but does not contain a specific amount. The situation does not arise in a Court of Claims judgment since, under current Court of Claims procedures, the amount is obtained from the employing agency, through the General Accounting Office, prior to issuing the judgment, and then included in the judgment. It does occur occasionally, however, in district court judgments. Examples are Marr v. Lyons, W.D. Okla., Civil No. 72-286, judgment entered January 18, 1974 (order on related motion reported at 377 F.Supp. 1146); Van Winkle v. McLucas, S.D. Ohio, Civil No. 4537, judgment

entered June 16, 1975 (separate issue reported at 537 F.2d 246 (6th Cir. 1976), cert. denied, 429 U.S. 1093).

It may be argued that a judgment which orders the payment of back pay without including a dollar amount is not a money judgment within the scope of 28 U.S.C. § 2414 and 31 U.S.C. § 724a, but that the payment of back pay in such a case is a part of the administrative action to be taken by the employing agency. Our research has disclosed relatively little judicial guidance. White v. Bloomberg, 360 F.Supp. 58 (D.Md. 1973), aff'd., 501 F.2d 1379 (4th Cir. 1974), was a suit for reinstatement and back pay by a discharged Postal Service employee. After determining that the plaintiff was entitled to back pay, without specifying the amount, the District Court found that a judgment against the Postal Service is not "one against the sovereign," and awarded post-judgment interest under 28 U.S.C. § 1961 which mandates interest "on any money judgment in a civil case." The Court concluded:

"Herein, on June 23, 1972, this Court specifically directed payment of back wages from the date of White's discharge to the date of White's reinstatement. The former date was October 30, 1970; the latter, June 29, 1972. The amount of back wages for each and every part of that period up to and including June 23, 1972, and White's rate of pay from and after June 23, 1972, were known on June 23, 1972 and at all times thereafter. So were the facts in connection with the amount earned and received by White from any employment he engaged in between October 30, 1970 and June 23, 1972. Thus, only simple mathematical calculations were required on and after June 23, 1972 to determine the dollar amount of back wages payable by the Postal Service to White. Accordingly, this Court's June 23, 1972 Order constituted a money judgment." 360 F.Supp. at 63.

The Fourth Circuit affirmed on the rationale that post-judgment interest was a normal incident of the Postal Service's power to "sue and be sued in its official name." 501 F.2d at 1385-86.

Fitzgerald v. Staats, 578 F.2d 435 (D.C. Cir. 1978), cert. denied, December 4, 1978, involved an Air Force employee ordered to be reinstated by the Civil Service Commission upon a finding of improper termination. The litigation involved several issues relating to the amount of back pay to be paid. Part of the Court's holding was that 31 U.S.C. § 227, which directs the withholding of debts owed to the

United States from final judgments, was not applicable because Fitzgerald was not a judgment creditor. The Court noted:

"The decision of the Commission was not, as Fitzgerald contends, an award of a sum certain in the form of a judgment. It was a ruling that Fitzgerald was entitled to the remedy provided by the Back Pay Act, which, by its terms, requires some non-mechanical calculations. The three opinions of the Comptroller General cited above reveal the extent to which the calculations in the instant case were not self-evident, and thus the extent to which the Civil Service Commission's ruling was not a judgment for a sum certain." 578 F.2d at 439.

While it seems clear that an award of back pay which does not include a dollar amount is not a "sum certain," we are of the opinion that a judgment ordering the payment of back pay is nevertheless a money judgment. 55 Comp. Gen. 1447 (1976). (Fitzgerald did not involve a judgment and thus the source of payment was not an issue.) Where a judgment orders the payment of back pay, that directive is part of the judgment and the judgment is therefore payable from the permanent appropriation.

Further, in our opinion, the language of the Back Pay Act is not sufficient to invoke the "otherwise provided for" exception in 31 U.S.C. § 724a. The Back Pay Act, quoted supra, establishes an entitlement to a monetary remedy under specified circumstances, but there is no provision made to authorize payment from agency funds when the entitlement arises as a result of a court's determination rather than administrative action.

It is also our opinion, however, that a judgment for back pay without a dollar amount is not, in and of itself, "final" for purposes of our certification for payment, even though it may be final with respect to plaintiff's right to recover. In order for a judgment to be paid from the permanent appropriation, it must be certified by the Comptroller General to the Treasury Department for payment. 31 U.S.C. § 724a, supra. This cannot be done until we have been furnished the amount to be certified for payment, with the assurance that it is not subject to further litigation. Under the back pay regulations, the employing agency must perform the computations. 5 C.F.R. § 550.804(a). It is clear that the agency's calculation is not binding on the plaintiff and is subject to judicial review. E.g., Burke v. Green, 422 F.Supp. 350, 358 (E.D. Penn. 1976). The Fourth Circuit in White v. Bloomberg, supra, discussed the problem as follows:

"In many cases the court may be able to compute back pay at the time it orders reinstatement. If a particular case presents a complex dispute over computation, the district court has discretionary power to bifurcate the proceedings under Rule 42(b) or Rule 56(c). Indeed, the district court might have done so here had it been asked. Or the district judge may prefer to have the employee and the agency seek agreement on the computation of back pay. If so, he may follow a procedure that has been employed in other Back Pay Act cases, ordering reinstatement and retaining jurisdiction over the back pay issue in case the parties cannot reach an administrative settlement. * * * 501 F.2d at 1385.

Accordingly, judgments awarding back pay will be certified for payment from the permanent appropriation, but where the judgment does not specify the amount to be paid, we must be furnished the employing agency's computation, together with written indication that the plaintiff will accept the amount in satisfaction of the judgment. If the parties agree on the amount, the written indication may be a separate letter from the plaintiff or the plaintiff's counsel, or may be incorporated into the Justice Department's transmittal letter. If the latter approach is used, the transmittal must plainly state that the plaintiff has agreed to accept the amount computed by the employing agency (or some compromise figure, if that is the case) in satisfaction of the judgment. If the parties are unable to agree, further resort to the court may be necessary. In that event, the amount finally determined to be payable should be specified in an amended judgment or supplemental order.

The point is that the judgment is not final for payment purposes until there is an agreed-upon amount. Disputes over the amount to be paid must be resolved--administratively or judicially--prior to the submission for payment.

2. Judgments under Title VII of the Civil Rights Act.

Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e et seq., prohibits employment discrimination. When originally enacted, it did not apply to the Federal Government. It was made applicable to the Federal Government by section 11 of the Equal Employment Opportunity Act of 1972, 42 U.S.C. § 2000e-16.

Title VII actions are brought in the United States district courts, which have broad discretion in fashioning remedies. Monetary awards

in Title VII cases, although they may conceivably take the form of damages (Hodge v. Commissioner, 64 T.C. 616 (1975)), generally represent back pay. The authority of a court to award back pay in a Title VII action is found in section 706 of the Civil Rights Act, 42 U.S.C. § 2000e-5(g), set forth in pertinent part below:

"If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. * * *" (Emphasis added.)

In addition, 42 U.S.C. § 2000e-16(c) provides that "the head of the department, agency, or unit, as appropriate, shall be the defendant" in a Title VII suit brought by a Federal employee. The question is thus whether, by virtue of the underscored language in 42 U.S.C. § 2000e-5(g), supra, in conjunction with the quoted portion of section 2000e-16(c), payment of a judgment for back pay under Title VII is "otherwise provided for" and therefore payable from agency appropriations.

The underscored language in 42 U.S.C. § 2000e-5(g), quoted above, was a part of the original 1964 Act; that is, it was enacted at a time when Title VII was not applicable to the Federal Government. Thus it could not have been originally intended to affect the source of funds for the payment of judgments involving the Federal Government. Its intent appears to have been merely to establish that back pay would not necessarily be payable by the employer, but could be payable by an employment agency or labor organization if the court found that the employment agency or labor organization was responsible for the unlawful practice. Thus, it is possible under section 2000e-5(g) for a court to order an employee reinstated with back pay, to be paid by someone other than the employer. But for the underscored language, section 2000e-5(g) would have seemed to indicate that back pay would be payable in all instances by the employer.

When Title VII was extended to the Federal Government in 1972, Congress saw no need to repeat entire sections of the existing law.

Instead, Congress merely incorporated the applicable portions of the existing procedure by including 42 U.S.C. § 2000e-16(d), as follows:

"The provisions of section 2000e-5(f) through (k) of this title, as applicable, shall govern civil actions brought hereunder."


We find nothing in the legislative history of the Equal Employment Opportunity Act of 1972 to indicate that Congress intended to address the question of whether the judgment would be payable from the indefinite appropriation or by the defendant agency from its own funds. While it is certainly possible to view the defendant agency as the "employer," it is equally possible to read "employer" as the United States. We have also found no explanation in the legislative history of the requirement to designate the agency head as defendant. However, as one court has noted:

"Although the commanding officer of the Shipyard was the nominal defendant against whom Richerson's action had to be brought under 42 U.S.C. § 2000e-16(c), in reality Richerson's claim was against the United States." Richerson v. Jones, 551 F.2d 918, 925 (3d Cir. 1977).

Accordingly, in the absence of more specific indication that Congress intended Title VII judgments to be treated differently from other money judgments against the United States, it is our view that Title VII judgments fall within the scope of 28 U.S.C. § 2414 and 31 U.S.C. § 724a and are payable from the permanent appropriation.

The portion of the discussion of Back Pay Act judgments, supra, dealing with the "finality" for payment purposes of judgments which award back pay but do not contain dollar amounts is equally applicable to Title VII judgments.

It should be noted that a Title VII violation does not necessarily entitle the employee to back pay. Therefore, a Title VII judgment which orders reinstatement without reference to back pay does not automatically result in a charge to agency appropriations.


Deputy Comptroller General
of the United States